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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-988

EPOCH PRODUCING CORPORATION,

Petitioner,

vs.

KILLIAM SHOWS, INC., GREGSTAN ENTERPRISES, INC., PAUL KILLIAM, MOVIELAB, INC.,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

STEPHEN F. ROHDE,
FLEISHMAN, MCDANIEL, BROWN & WESTON,
6922 Hollywood Boulevard,
Suite 718,
Hollywood, Calif. 90028,
(213) 466-6171,
Counsel for Petitioner.

STANLEY FLEISHMAN,
SAM ROSENWEIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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KILLIAM SHOWS, INC., GREGSTAN ENTERPRISES, INC., PAUL KILLIAM, MOVIELAB, INC.,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

The petitioner, Epoch Producing Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 13, 1975.

Opinion Below.

The opinion of the Court of Appeals is reported in 522 F.2d 737. A copy of the opinion appears in Appendix "A" hereto. No opinion was rendered by the District Court for the Southern District of New York following the return of the jury's verdict in petitioner's favor.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was rendered on August 13, 1975. A timely

Petition for Rehearing was denied on October 16, 1975. The order denying said Petition for Rehearing appears in Appendix "B" hereto. A Motion to Stay Issuance of the Mandate pending Petition for a Writ of Certiorari was granted on November 5, 1975. The order granting said Motion for Stay appears in Appendix "C" hereto. A Motion to further stay issuance of the mandate was granted on December 24, 1975, on condition that petitioner post a supersedeas bond The order granting the Motion for further stay appears in Appendix "D" hereto.[1] This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

Questions Presented.

1. Whether, upon the verdict and special findings by the jury after trial that petitioner acquired ownership of a valid and lawful copyright and renewal copyright to the motion picture, "Birth of a Nation", the action of the Court of Appeals in setting aside the jury's verdict and directing dismissal of petitioner's copyright infringement complaint is contrary to the provisions of the Seventh Amendment and the due process provisions of the Fifth Amendment.

2. Whether, in light of the language of the Copyright Act, and the long standing administrative practice of the Copyright Office, the Court of Appeals erred in holding that a certificate of registration of a renewal copyright under 17 U.S.C. §24 is not *prima facie* evidence of the facts stated therein and of the validity of the renewal under 17 U.S.C. §209.

3. Whether, in disregard of the express provisions of the Copyright Act (17 U.S.C. §209), providing

[1]Petitioner is preparing an application to reduce the amount of the supersedeas bond.

that a certificate of registration of copyright is *prima facie* evidence of the facts stated therein, the Court of Appeals acted contrary to law and the due process and jury provisions of the Fifth and Seventh Amendments in deciding that there was no evidence to support the verdict and special findings of the jury after trial that petitioner acquired the ownership of a valid copyright and renewal copyright to the motion picture, "Birth of a Nation".

4. Whether the verdict and special findings of the jury after trial rested upon a strong evidentiary basis in support of the judgment rendered in the district court in favor of petitioner, and therefore deprived the appellate court of the power to reweigh the evidence and set aside the jury verdict merely because the appellate court felt that a contrary result was more reasonable, in violation of the provisions of the Seventh Amendment and the due process provisions of the Fifth Amendment.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the Fifth and Seventh Amendments to the Constitution of the United States and the provisions of Title 17 U.S.C. §§24, 26, 28, 209 and 210 appear in Appendix "E" hereto.

Statement of the Case.

In 1904 Thomas Dixon ("Dixon") wrote and copyrighted a novel entitled The Clansman (E. 19).[2] On December 20, 1913 Dixon entered into a written agreement with Majestic Motion Picture Company ("Majestic") by which he granted to Majestic the "sole and

[2]References to "E" refer to the "Exhibit Volume".

exclusive right for the world" to produce motion pictures based on The Clansman and to copyright said motion pictures in the names of Dixon and Majestic (E. 1).

Beginning in 1914 Majestic and the David W. Griffith Corporation ("Griffith Corporation"), as part of a series of features (E. 28), produced a motion picture based on The Clansman which was subsequently entitled "The Birth of a Nation" (the "Picture"). The Picture was directed by D. W. Griffith, with scenario by D. W. Griffith and Frank E. Woods and photography by William Bitzer (E. 10-13, 35, 43).

On February 6, 1915 the Griffith Corporation filed an Application for Copyright in the Picture, as an unpublished work, stating in its Application that the authors were David W. Griffith and Frank E. Woods (E. 13). On February 13, 1915 the Copyright Office duly issued a Certificate of Copyright Registration, Class L, UNP, No. 4453 in the name of the Griffith Corporation in the Picture (E. 12).

The Picture was completed and on February 8, 1915 it was first published and publicly exhibited at the Clune Auditorium in Los Angeles, California.

On April 17, 1915 the Griffith Corporation executed two instruments of Assignment, assigning the published and unpublished copyrights in the Picture to petitioner Epoch Producing Corporation ("Epoch") and Dixon (E. 14-18).

By written Agreement between Majestic, Dixon and Epoch dated June 14, 1915 (E. 7), Majestic conveyed all of its rights, duties and obligations under its earlier agreements with Dixon to Epoch, and Dixon agreed to accept such performance by Epoch in place and stead of performance by Majestic.

On October 1, 1915 Epoch and Dixon filed an Application for Copyright in the Picture stating that it was first publicly exhibited on February 8, 1915 and produced under the direction of D. W. Griffith (E. 11). Thereafter, on October 18, 1915 the Copyright Office duly issued a Certificate of Copyright Registration, Class L, No. 6677, in the name of Epoch and Dixon in the Picture (E. 10).

On June 22, 1942 Epoch applied for a renewal of copyright in the Picture (E. 22). Thereupon, the Copyright Office issued a Certificate of Copyright Registration, Class R, No. 109505 in Epoch's name for the renewal copyright (E. 21).

On May 22, 1969 Epoch filed this action in the United States District Court for the Southern District of New York alleging that respondents had infringed Epoch's copyright in the Picture. On June 18, 1973 the case came to trial and on June 27, 1973 the jury found in Epoch's favor. In a special verdict, the jury responded affirmatively to the questions (a) whether Epoch acquired ownership of a valid and lawful copyright in the Picture and (b) whether Epoch acquired ownership of a valid and lawful renewal copyright in 1942. On December 10, 1973 District Judge Charles Brieant rendered judgment against respondents assessing damages of $6,500.00 and awarding $5,000.00 in attorneys fees to Epoch.

On appeal, respondents abandoned their claim made throughout the trial that respondent Killiam Shows, Inc. owned the renewal copyright in the Picture, 522 F.2d at 742 (n.5), and conceded Epoch's valid acquisition of the original term of copyright in the Picture (App. Br. p. 73).

REASONS FOR GRANTING THE WRIT.

The action of the court below unconstitutionally invaded the function of the jury in violation of the Seventh Amendment to the Constitution, contrary to applicable rulings of this Court, and nullified rights granted by Congress in its enactment of the Copyright Act. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690; *Lavender v. Kurn*, 327 U.S. 645.

1. The jury in this case could reasonably and intelligently have concluded, from the written agreements and instruments of assignment introduced at trial and from the conduct of the parties, that Epoch acquired the right to copyright the Picture for both the original and renewal terms of copyright. Indeed, every fair inference to be drawn from the evidence demonstrates that through a series of documented transactions the parties intended Epoch to accumulate the rights of all of the participants involved in the production of the Picture, for the full life of copyright protection.

The jury could well have concluded that Epoch purposely combined whatever rights Majestic and the Griffith Corporation held for the purpose of centralizing the exploitation of the Picture and holding the full term of copyright protection in a new entity in which the principals of Majestic and the Griffith Corporation would participate (J.A. 184A).[3]

Thus, the sources of Epoch's rights were (a) Majestic and Dixon, pursuant to the June 14, 1915 Agreement (E. 7) and the January 26, 1916 Assignment (E. 19) and (b) the Griffith Corporation, pursuant to

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[3]References to "J.A." refer to the two volume "Joint Appendix".

the two instruments of Assignment dated April 17, 1915 (E. 14 through 18).

At trial, respondents attempted to disprove that Epoch had acquired full copyright protection from either of these sources and sought to establish that D. W. Griffith personally owned the renewal copyright. The jury rejected these defenses and held in Epoch's favor. On appeal, the court below resurrected respondents' factual theories and substituted them in place of those found by the jury, contrary to the decisions of this Court and those of the circuit courts.

2. *Epoch's Rights Through Majestic.* The court below held that there was "no evidence" that anyone other than Griffith produced the Picture; that there was "no evidence" that Majestic participated in the making of the Picture or that it hired Griffith or anyone else to do so; that the record is "without any evidence" as to what part, if any, Majestic or Epoch played in the making of the Picture and that there was "no showing" that Majestic and/or Epoch actually supervised or paid any money for the making of the Picture. 522 F.2d at 741, 742, 743 (n.4) and 744.

It was conceded by all parties that Dixon's 1904 novel The Clansman was the literary work upon which the Picture was based. Majestic acquired the "sole and exclusive" right to make a motion picture based upon this literary work and the right to copyright the motion picture in the joint names of Majestic and Dixon. Majestic's rights, duties and obligations under this agreement were later transferred to Epoch, with Dixon accepting Epoch in the place and stead of Majestic. There was no evidence that D. W. Griffith or the Griffith Corporation obtained any rights to

Dixon's literary work or had the right to make and copyright a motion picture based on that literary work. Rather, documentary evidence and testimony showed that Majestic and the Griffith Corporation were engaged in producing a series of motion pictures, including the Picture. The jury could reasonably have found that Majestic acquired the rights and provided the financing, while the Griffith Corporation furnished the services of D. W. Griffith as director. (This would explain the quandary created by the court below as to why the Griffith Corporation had only nominal income or expenses in 1915.)

Aside from its agreements with Dixon, evidence introduced by respondents also showed that Majestic was involved in the production of the Picture. By letter dated April 15, 1914 (E. 28) H. E. Aitken, President of Majestic, wrote to D. W. Griffith as follows:

> "Everything is getting in very fine shape, and we should begin to make money from now on. Let the Majestic and the D. W. Griffith Company handle the features now for a little while, and I think your next feature should be an Elderbrush Gulch film, and then we will get after 'The Clansman'."

In addition, one of respondents' own witnesses, Joseph Henabery, who played the part of Abraham Lincoln in the Picture, testified that Frank Woods, identified in the Copyright Registration Certificates as one of the authors of the scenario of the Picture, was "second in command at the studio" during the making of the Picture (J.A. 259A, 263A). When asked to identify the studio, Mr. Henabery replied "Reliance Majestic Studio which we called the Griffith Studio. He was second in command. Before the 'Birth

of a Nation' and during it we were making one and two reel pictures and Mr. Woods handled all that, supervised all that. . . ." (J.A. 263A).

Finally, one document which was not admitted[4] provides further evidence of Majestic's role in producing and financing the Picture (E. 61). The March 2, 1915 letter from Majestic to Epoch states that the Picture "was produced at the Majestic Studios under the direction of Mr. D. W. Griffith and the actual cost thereof so far has been the sum of $110,000.00". In the letter, Majestic offered to transfer to Epoch all of its right, title and interest in the Picture for the sum of $110,000.00 or, at Epoch's option, 1100 shares of Epoch's capital stock, noting that Epoch "has been organized for the purpose of handling the production". This transfer was subsequently confirmed by written Agreement (E. 7). Thus, the letter demonstrates Majestic's active role in the production of the Picture, its investment of $110,000.00, the use of its studios, the role of D. W. Griffith as director, and the formation of Epoch for the purpose of marketing and exhibiting the Picture.

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[4]The trial court improperly excluded the letter on the grounds that no foundation had been laid for its admission (J.A. 74-1A), notwithstanding the fact that the parties had stipulated that "Any document dated more than ten (10) years before date hereof [May 18, 1971], shall be considered as executed by the signatories thereto at or about the date indicated in said document" (J.A. 58A); that Epoch's counsel represented to the court that the document had been obtained from Epoch's "old files" furnished by prior counsel and that several other documents bearing similar typed signatures were received in evidence (E. 1; E. 3; E. 87). Compare *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*, at 704, in which this Court considered improperly excluded evidence in reversing an appellate court's finding of insufficient evidence to justify a jury verdict.

Thus, from all of the evidence, the jury could have reasonably concluded that Majestic owned the full copyright in the picture, and upon conveyance to Epoch, Epoch had the right to copyright the Picture for both the original and renewal terms.

3. *Epoch's Rights Through the Griffith Corporation.* The court below found that there was "no proof" that the Griffith Corporation had any right to apply for the original copyright in the Picture in its own name; that the Griffith Corporation "could not" have been an employer of Griffith because it was essentially an "inactive shell corporation"; that Epoch cited "no evidence" that the Griffith Corporation intended by the two Assignments to convey the renewal copyright; and that the two Assignments must be treated as having been made by an individual author since the Griffith Corporation was "controlled" by Griffith and was, in effect, his "alter ego". 522 F.2d at 745, 747 (n.8).

In reaching the conclusion that there was "no proof" that the Griffith Corporation had any right to apply for the original copyright in the Picture in its own name, the court below ignored the Congressional policy expressed in 17 U.S.C. §209 and repeated decisions recognizing the presumption of validity which attaches to an original copyright registration and the fact that such registrations constitute "prima facie evidence of the facts stated therein". 17 U.S.C. §209; *Herbert Rosenthal Jewelry Corp. v. Gross Bardt*, 428 F.2d 551 (2nd Cir. 1970); *Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970); *Rohauer v. Friedman*, 306 F.2d 933 (9th Cir. 1962); *Vance v. ASCAP*, 271 F.2d 204 (8th Cir. 1959); Nimmer on Copyright, §139.2.

This presumption applied to both the original copyright registrations duly issued to the Griffith Corporation and Epoch and thus established the following facts at the trial, in the absence of rebuttal by respondents:

(a) That the Griffith Corporation was entitled to apply for the original copyright in its own name,

(b) That subsequently Epoch was entitled to apply for copyright in its own name, and

(c) That the Picture was produced by several parties under the direction of D. W. Griffith, based on Dixon's novel with scenario by D. W. Griffith and Frank E. Woods, and photography by William Bitzer.

In the absence of contrary evidence, the jury was bound by these facts and could reasonably have inferred that the Griffith Corporation held the full copyright in the Picture, including the renewal term, 17 U.S.C. §24, as a work composed by several persons related to a corporation, see *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697, 699 (2nd Cir. 1941); as a work composed by a group of persons in which their individual contributions were merged into the whole and were incapable of separate identification (such as is usually the case in the production of a full length motion picture); B. Ringer, "Renewal of Copyright" in "Report of the Register of Copyrights on the Revision of the U.S. Copyright Law", Study No. 31 at 136-7 (1960) "Ringer"; Compendium of Copyright Practices Sec. 11.8.4 III(4) (U.S. Copyright Office, 1974), or as a work for hire made by Griffith, Woods, Bitzer and others as employees of the Griffith Corporation. 17 U.S.C. §26; *Picture Music, Inc. v.*

Bourne, Inc., 457 F.2d 1213 (2nd Cir.), cert. den. 409 U.S. 997 (1972).

The suggestion of the court below that the only way that the Griffith Corporation could have acquired these rights was as an assignee or licensee of D. W. Griffith's common law copyright, 522 F.2d at 747(n. 8), in which case the Griffith Corporation would not have acquired the renewal rights is, at best, only one of several possibilities, each of which could reasonably be supported by the evidence.

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35.

The only grounds the court below found for holding that the Griffith Corporation did not obtain and assign the renewal term was that Griffith "could not" have been an employee for hire, because the Griffith Corporation was an "inactive shell". 522 F.2d at 745.

Similarly, the viability of the Griffith Corporation figured prominently in the court's rejection of the jury's conclusion that the two instruments of Assignment were intended to convey the renewal term. 522 F.2d at 747.

The only evidence cited by the Court to sustain its conclusion that the Griffith Corporation was an "inactive shell", "controlled by Griffith" and thus, in effect, his "alter ego", were four state and federal income tax returns filed by the Griffith Corporation for the years 1914 and 1915 (E. 46 through E.

60). All that these tax returns appear to show is that the Griffith Corporation was incorporated on December 31, 1913; that during the following year it had no income or expenses and that during 1915 it had a net income of over $4,000.00.

The substantial weight of the evidence was that the Griffith Corporation was in all respects a viable entity, separate and apart from D. W. Griffith himself. The tax returns themselves were duly executed by Albert H. T. Banzhaf, as Treasurer and H. E. Aitken, as Vice President. Other instruments in evidence were also duly executed on behalf of the Griffith Corporation with all of the formalities expected of corporate documents (including the affixing of the seal by order of the Board of Directors) (E. 14 through 18).

H. E. Aitken's letter dated April 15, 1914 (E. 28) addressed to D. W. Griffith (at the Griffith Corporation's California address as shown on its copyright Application (E. 13)) referring to the upcoming projects of Majestic and the D. W. Griffith Company, including "the Clansmen", is further evidence that the Griffith Corporation was not an "inactive shell".

Indeed, on this issue, not only did the court below improperly substitute its own conclusions for those of the jury, but did so contrary to the applicable law.

Under the law, a corporation's status is not lightly disregarded and where, as here, there is no allegation or evidence that a recognition of corporate separateness would aid the consummation of fraud, misrepresentation or illegality, the simple fact that a corporation bears an individual's name or operates on a modest basis,

will not justify piercing the corporate veil.[5] Where one has created a corporate arrangement as the means of carrying out his business, neither he nor those who claim under him may choose to disregard the corporate entity in order to avoid its disadvantages.[6]

4. The court below held that, as a matter of law, in the absence of a specific reference to the "renewal term" in the two Assignments, they must be deemed to have conveyed only the original term of copyright. Faced with the fact that this rule has been applied only to assignments made by individual authors as a means of protecting them from inadvertent transfers of renewal rights, *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518 (2nd Cir.), cert. den. 358 U.S. 831; *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2nd Cir.), cert. den. 342 U.S. 849, the court deemed the difference between an assignment by a corporation and by an individual author not "critical", because the Griffith Corporation was "controlled by the author". 522 F.2d at 747. From all that has been said, it is plain that there was neither factual nor legal basis for this conclusion. The court below chose nevertheless to adopt it as a fact, contrary to the jury's verdict, and in so doing violated

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[5]*Dalton v. Bowers*, 287 U.S. 404, 410; *Burnet v. Clark*, 287 U.S. 410, 414; *Nelson v. Brunswick Corporation*, 503 F.2d 376, 380-381 (9th Cir. 1974); *Lehigh Valley Industries, Inc. v. Birenbaum*, 389 F.Supp. 798, 804-805 (D.C. N.Y. 1975); *Eskimo Pie Corp. v. White Lawn Dairies, Inc.*, 266 F.Supp. 79, 83 (D.C. N.Y. 1967).

[6]*Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437; *Commissioner of Internal Revenue v. Schaefer*, 240 F.2d 381, 383 (2nd Cir. 1957); *Terry v. Yancy*, 344 F.2d 789, 790 (4th Cir. 1965).

Epoch's constitutional rights under the Seventh Amendment.

In the absence of the special rule regarding the interpretation of an assignment by an individual author, the law is clear that "general words of assignment can include renewal rights if the parties had so intended". *Venus Music Corp. v. Mills Music, Inc.*, 261 F.2d 577, 578 (2nd Cir. 1958). This is a question of fact for the jury, *Venus Music Corp. v. Mills Music, Inc., supra.*, and may be established "from the language of the agreements and the attendant circumstances". *Siegel v. National Periodical Publications, Inc.*, 364 F.Supp. 1032, 1037 (S.D. N.Y. 1973); *Rossiter v. Vogel*, 134 F.2d 908 (2nd Cir. 1943); Nimmer on Copyright, §117.1.

From all of the evidence, the jury could reasonably have concluded that it was the intention of the Griffith Corporation to assign to Epoch the full period of copyright protection in the Picture, including the renewal term. Both the language of the Assignments themselves and the conduct of the parties adduced at trial support such a conclusion.

In one of the Assignments (E. 16), signed by D. W. Griffith as President, the Griffith Corporation recited that it had obtained the unpublished copyright and thereby assigned to Epoch and Dixon "*all its right, title and interest in and to the copyright* of the motion picture photoplay known as 'The Birth of a Nation';" that the "said *entire right, title and interest* to be held and enjoyed" by Epoch and Dixon "to the full end of the term for which said copyright has been granted, *as fully and entirely as the same would have been held and enjoyed by the said David W. Griffith*

Corporation had this Assignment and sale not been made." (Emphasis added).

In the other instrument of Assignment (E. 14), the Griffith Corporation recited that it had assigned, transferred and set over and did assign, transfer and set over to Epoch and Dixon the copyright acquired by it by public presentation of the Picture with notice on February 8, 1915, and granted to Epoch and Dixon the right to apply to the Register of Copyrights for and secure a Certificate of Copyright upon the Picture under the copyright law or in any other way in the name of Epoch and Dixon or otherwise.

Thus, the terms of the Assignments themselves could reasonably have been interpreted by the jury as being intended by the parties to place Epoch and Dixon in the shoes of the Griffith Corporation and to convey the full and entire term of copyright, including the renewal period. It has been held that a corporate assignment of all "right, title and interest" may be interpreted as conveying both the original and renewal copyright. *Rohauer v. Friedman,* 306 F.2d 933, 936 (9th Cir. 1962).

Moreover, the jury was not left to divine the intention of the parties solely from the face of the Assignments themselves. Contrary to the court's suggestion that "Epoch points to no evidence of a different intention", 522 F.2d at 747, there were several other items of evidence which showed that D. W. Griffith did not intend to reserve the renewal copyright to himself, assuming he had any right to do so.

It was established at trial that by Agreement dated December 20, 1937 (E. 100), as later modified by Agreement dated September 12, 1941 (E. 103), D. W.

Griffith granted the Museum of Modern Art Film Library Corporation the right to store and care for "all the films . . . belonging" to him. An examination of the list of films attached to the September 12, 1941 Agreement shows that the Picture is conspicuously absent.

Similarly, it was established at trial that D. W. Griffith was alive in 1942 when the original term of copyright in the Picture expired but that he took no action to renew the copyright in his own name or that of the Griffith Corporation, or to object to Epoch's renewal, notwithstanding the fact that he evidenced his continuing interest in the protection of his films by entering into the Agreements with the Museum of Modern Art Film Library just prior to 1942.

Finally, there was additional evidence that D. W. Griffith did not intend to reserve any of his rights in the copyright to the Picture, based on the testimony and documentary evidence relating to his lifelong counsel, Loyd Wright, Sr. In portions of Mr. Wright's deposition (which were read to the jury by stipulation) he testified that he had been D. W. Griffith's attorney from 1915 to Mr. Griffith's death (J.A. 240A). Respondents introduced a Bill of Sale (E. 84)[7] between Loyd Wright as Executor of the Griffith Estate and respondent Killiam Shows, Inc. dated May 6, 1959 by which all of the estate's right, title and interest in several motion pictures, including the Picture, were

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[7]It was this Bill of Sale that Respondents relied on in claiming that they owned the renewal copyright in the Picture until, of course, they abandoned that claim on appeal. 522 F.2d at 742 (n. 5).

transferred to respondent Killiam Shows, Inc. "without warranty as to copyright or otherwise". Thus, D. W. Griffith's lifelong attorney and the person who represented him in 1915 when the two instruments of Assignment were executed made no warranty as to any copyright held by Griffith in the Picture after the renewal copyright had been obtained by Epoch.

Certainly, the court below points to language in the Assignments from which one might derive a different intention. But where, as here, "there is an evidentiary basis for the jury's verdict, the jury is free to disregard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn, supra,* at 653.

5. In an unprecedented ruling, the court below held that a Certificate of Copyright Registration of a renewal copyright is not *prima facie* proof of the facts stated therein or of the validity of the renewal copyright. 522 F.2d at 745. An examination of the language of the Copyright Act and the longstanding administrative practice of the Copyright Office demonstrates that such a Certificate is entitled to such evidentiary presumptions.

Section 24 of the Copyright Act entitles certain proprietors of copyright to a further term of 28 years "when application for such renewal and extension shall have been made to the Copyright Office and *duly registered therein* within one year prior to the expiration of the original term of the copyright." (Emphasis added). Section 209 of the Copyright Act, without distinguishing between Certificates of Copyright Regis-

tration in original or renewal copyrights, requires the Register of Copyrights to prepare a certficate "to be filled out in each case as above provided for in the case of *all registrations* made after July 1, 1909, . . ." (Emphasis added). Section 209 goes on to provide that "Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein." Finally, §210 of the Copyright Act requires the Register of Copyrights to "fully index *all copyright registrations* and assignments" and to print a catalog and index which "shall be admitted in any court as prima facie evidence of the facts stated therein as regards *any copyright registration.*" (Emphasis added).

These all-inclusive references can reasonably be interpreted to include both registrations of original copyrights and renewal copyrights, in the absence of any language to the contrary. The reference to "all registrations" in §209 means "all registrations" and cannot be construed to mean "some registrations". Likewise, it would be anomolous for §210 to accord *prima facie* weight to the catolog and index of copyright entries, which includes entries regarding renewal copyrights, and not to accord such *prima facie* weight to the registrations themselves, which are identical in form to the registrations issued for original copyrights (E. 10, 12, 21).

This construction is supported by the interpretation of the Copyright Office, to which this Court shows "great deference" in interpreting statutes. *Udall v. Tallman*, 380 U.S. 1; *Unemployment Comm'n. of Territory of Alaska v. Aragon*, 329 U.S. 143. In the "Opinion of the Attorney General of the United States on Copyright Renewals Under §24 of the Copyright Act," 183 U.S.P.Q. 624 (1974), on the question of whether

the Register of Copyrights had authority to reject an application for the renewal of a copyright which contained contradictory factual statements, the Attorney General stated with explicit reference to renewal copyrights:

> "In contrast, the Copyright Office notes that the registration certificate it issues are by statute deemed, in judicial proceedings, to be prima facie evidence of the facts stated therein (17 U.S.C. 289 [sic]). Therefore the Office contends that it is a valid exercise of its discretionary authority to withhold registration of renewal certificates which, because of patent factual contradictions, would in effect be void upon their issuance." 183 U.S.P.Q. at 625.

Similarly, after noting that the Copyright Office is obliged to protect the integrity of the copyright process and that registered applications become part of the public records of the Copyright Office (17 U.S.C. 212) from which the public and prospective publishers may ascertain the asserted facts pertaining to a copyright claim, the Attorney General states, again in the specific context of renewal copyrights "Equally, important as noted earlier, the certificate of registration is prima facie evidence of those facts. 17 U.S.C. 209." 183 U.S.P.Q. at 628.

These expressions of the policy of the Copyright Office as adopted and affirmed by the Attorney General, constitute weighty support for the construction urged by Epoch.

To support its holding in this regard, the court below found a "drastic diversity in the treatment of original and renewal applications" by the Copyright

Office and that renewal certificates were issued to "all claimants regardless of questions concerning validity". 522 F.2d at 746. These conclusions do not find support in the actual practices of the Copyright Office. "Examination of a renewal application involves whether the claim has been filed within the statutory time limits, whether it is consistent with the facts shown in the records of original registration, and whether it falls within one of the statutory classes of beneficiaries." Ringer at 183-4. See also, Nimmer on Copyright, §95.1, p. 358. Chapter 11 "Renewal Registration" of the Compendium of Copyright Office Practices (1973) is filled with indications that the Copyright Office will review and reject renewal applications on several grounds, comparable to its approach to applications for original copyright. And in this regard, although the court below cited provisions of the Regulations of the Copyright Office regarding original registrations, it neglected to consider similar regulations relating to renewal copyrights. 37 C.F.R. §202.17. Finally, it is manifest from the Opinion of the Attorney General, 183 U.S.P.Q. 624, that the Copyright Office does not blindly issue renewal certificates.

Thus, the practices of the Copyright Office provide further support for according *prima facie* weight to Certificates of Copyright Registrations in renewal copyrights as well as original copyrights. The only reported decision on this issue so holds. *Rohauer v. Killiam Shows, Inc.*, 379 F.Supp. 723 (S.D. N.Y. 1974).

Assuming that some presumption of validity might attach to Epoch's renewal certificate "at least where 27 years passed without challenge", the court below found that the presumption dissipated by proof "that material statements in the certificate were false". 522

F.2d at 746. A proper application of the law to the facts of this case demonstrates that no false statements were made in Epoch's application.

The court below accused Epoch of making two such false statements. First, that it was "the proprietor of copyright in a work made for hire" although Epoch did not come into existence until after the Picture had been made and secondly, that Epoch was the "author of the film".

As to the first, the court misunderstood that according to the law and the instructions accompanying the Application (E. 23), if a work has been originally copyrighted by an employer for whom the work was made for hire, the proprietor at the time of the renewal may renew as "proprietor of copyright in a work made for hire". Nimmer on Copyright, §114.4, p. 470 (n. 57) and cases cited therein; Compendium of Copyright Practices, Part 11.8.1. I. According to the Attorney General "a proprietor in this sense means the person who owns the copyright at the time of renewal. It may be the employer, its successor in interest, or someone to whom the copyright had been sold." 183 U.S.P.Q. at 626(n.6). Obviously, Epoch was not claiming and never claimed in this case that D. W. Griffith was its employee for hire at a time prior to Epoch's incorporation. The characterization used by Epoch in its renewal Application was not false but, to the contrary, was in full compliance with the law and the instructions to the Application.

As to the second purportedly false statement, at no point in the renewal application (E. 22) did Epoch characterize itself as "the author of the film". In item "(5)" Epoch's name was entered as the "author of renewable matter", but in light of the fact that the Application forthrightly states that the Picture "was

produced under the direction of David W. Griffith based on Thomas Dixon's novel "The Clansman", scenario by D. W. Griffith and Frank Woods," it is apparent that Epoch intended no deception but may have thought itself entitled to such status by reason of additional material added between 1915 and 1942 or simply felt it necessary to fill in all the blanks.

Thus, it is plain that the renewal Application contained no false statements by Epoch and was entitled to be treated as *prima facie* proof of the facts stated therein and of the validity of the renewal copyright. As noted above, the jury reasonably concluded that respondents did not discharge the burden of proof which had thus been shifted to them. *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2nd Cir. 1970); *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956); Nimmer on Copyright, §139.2, pp. 603-604.

This case thus presents a matter of first impression calling on this Court to hold that a certificate of registration in a renewal copyright is entitled to *prima facie* weight under 17 U.S.C. §209.

6. This case calls for review by this Court because it involves two overriding policies which this Court has steadfastly pursued.

First, this Court has long recognized its duty to supervise the application of the Copyright laws with a view to effecting the purposes intended by Congress and so as to prevent any deprivation of the benefits of those laws which Congress intended to grant. *Bobbs Merrill Co. v. Straus*, 210 U.S. 339.

Secondly, this Court has consistently held that:

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise

its power of review in any case where it appears that the litigants have been improperly deprived of that determination." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 509. See also *Jacob v. New York City*, 315 U.S. 752.

A jury trial in a copyright infringement case is a basic remedy integral to the enforcement of the Copyright Law. Moreover, the Seventh Amendment to the Constitution provides that, "The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Review is required by this Court to consider the action of the court below in failing to abide by the verdict rendered by the jury.

Since the grant of a motion for a directed verdict deprives a party of a determination of the facts by a jury, the motion is sparingly granted. It has been repeatedly stated that the fundamental principle is that there must be a minimum interference with the jury. *Continental Ore Company v. Union Carbide and Carbon Corp., supra,* ("The Court of Appeals was, of course, bound to view the evidence most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." 370 U.S. at 696-697); *Lavender v. Kurn, supra,* ("The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite

from the one reached by the jury." 327 U.S. at 652-653).[8]

In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, the Court emphasized that in any proceeding where trial by jury is part of the remedy, as in cases under the Jones Act and under the Federal Employers Liability Act, the provisions of the Seventh Amendment are brought into play. It is the Seventh Amendment that fashions "the federal policy favoring jury decisions of disputed fact questions". 369 U.S. at 360. See also, *Halliday v. United States,* 315 U.S. 94 (suit on War Risk Insurance Policy); *Kaufman v. Tredway,* 195 U.S. 271 (bankruptcy preference); Wright & Miller, Federal Practice and Procedure: Civil §2524, *et seq.;* 5A Moore's Federal Practice §50.02, *et seq.*

The standards enunciated by the court below appear clearly contrary to the decisions of this Court and in conflict with many decisions of the courts of appeals in the various circuits throughout the nation. Thus, the Court stated in *Lavender, supra:*

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to

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[8]See also, *International Terminal Operating Co. v. N. Y. Nederl, A.S.M.*, 393 U.S. 74; *Basham v. Pennsylvania Railroad Co.*, 372 U.S. 699; *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108; *Rogers v. Missouri Pacific Railroad Co., supra; Schulz v. Pennsylvania Railroad Company,* 350 U.S. 523.

> them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." 327 U.S. at 653.

In *Tennant v. Peoria & P.U. Ry. Co., supra,* the Court reiterated the fundamental principles which govern the function of an appellate court reviewing a jury verdict.

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from conflicting inferences and conclusions that which it considers most reasonable. [Citations omitted] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored." 321 U.S. at 35.

The emphasis has constantly been that obedience to the command of the Seventh Amendment, not to interfere with the jury's function, is a matter of high constitutional importance, and that this Court as well as other appellate courts are required to insure the preservation of this constitutional right. See also, *Equi-*

table Life Assurance Society of United States v. Fry, 386 F.2d 239, 248 (5 Cir. 1967) (" '[i]t is the quintessential function of the jury to "settle the dispute by choosing what seems to them to be the most reasonable inference." * * * It is no answer * * * to say that a conflicting inference might with equal probability have been drawn therefrom.' "); *Compton v. United States*, 377 F.2d 408, 411 (8 Cir. 1967) ("The jury—and not the court—is the ultimate fact-finding body, and, so long as divergent conclusions may be reasonably drawn from the evidence, a jury verdict may not be disturbed."); *United States v. Kalmutz*, 309 F.2d 437, 440 (5 Cir. 1962) (" 'We think this is a conclusion on which men may reasonably differ, the very sort of question on which a jury verdict ought not to be disturbed."); *Rose v. Ruan Transport Corp.*, 214 F.2d 583, 585 (7 Cir. 1954) ("And it is permissible to draw several conclusions or presumptions of fact from the same set of facts or circumstances . . . Only where there is a complete absence of probative facts to support the conclusion reached does reversible error appear."); *Traders & General Ins. Co. v. Powell*, 177 F.2d 660, 665 (8 Cir. 1949) (". . . reasonable inferences to be drawn from a course of conduct and pertinent and relevant circumstances . . . constitute evidence, not presumptions . . . and if such circumstances and such inferences justify the inference of consent [to such conduct], positive evidence in rebuttal cannot destroy the probative force of such circumstances."); *Liberty Mutual Ins. Co. v. Thompson*, 171 F.2d 723, 726 (5 Cir. 1949) ("In actions at law in the federal courts, . . . the right of trial by jury is preserved by the Seventh

Amendment, . . . Even though the appellate judges may not believe the fact . . . found to be true, . . . an appellate court has no constitutional right to express an opinion as to the truth or falsity of such fact, the issue being entirely within the province of the jury.").

It is submitted, in light of all of the foregoing, that the court below deprived Epoch of a jury verdict to which Epoch was entitled under both the law and the Constitution. The Copyright Act grants causes of action for damages as well as injunctions against any person who infringes a copyright protected under the copyright laws of the United States. 17 U.S.C. §§101-116. Another provision of the Copyright Act provides that a certificate of registration under seal of the Copyright Office is *prima facie* evidence of the facts stated therein. 17 U.S.C. §209. Section 24 of Title 17 provides specifically that any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, entitles the proprietor of such copyright to a renewal and extension of the copyright.

All of these provisions are intended to protect not only individual authors and the public generally, but also those employers and proprietors whose investments have made possible the production of literary, dramatic or other works or compositions of similar character. It is important for this Court to decide whether jury trials which are integral to the enforcement of the Copyright Act enacted by Congress can be undermined by appellate court interference with the jury function.

The result of the action by the court below in injecting the Picture into the public domain has, it is submitted, resulted in the arbitrary deprivation of Epoch's property without due process of law, all in contravention of the protective guarantees of the Fifth and Seventh Amendments.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

STEPHEN F. ROHDE,
FLEISHMAN, MCDANIEL, BROWN & WESTON,
Counsel for Petitioner.

STANLEY FLEISHMAN,
SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion and Judgment of Court of Appeals.

Epoch Producing Corporation, Plaintiff-Appellee and Cross-Appellant, v. Killiam Shows, Inc., et al., Defendants-Appellants and Cross-Appellees. Killiam Shows Inc., et al., Third-Party Plaintiffs-Appellants, v. Raymond Rohauer and Jay Ward Productions, Inc., Third-Party Defendants-Appellees.

Nos. 246, 247, 390, Dockets 73-2795, 74-1269, 74-1425.

United States Court of Appeals, Second Circuit. Argued May 2, 1975. Decided Aug. 13, 1975.

Jeffrey Squires, Washington, D. C., Peter Jaszi, Chevy Chase, Md. (Goldfarb & Singer, Washington, D. C., Edward A. Sargoy, New York City, of counsel), for defendants-appellants, cross-appellees, and third-party plaintiffs-appellants.

Louis Jobrack, New York City (Isadore B. Hurwitz, New York City, of counsel), for plaintiff-appellee and cross-appellant and third-party appellees.

Gerald Meyer, New York City (Phillips, Nizer, Benjamin, Krim & Ballon, New York City, Melville, Nimmer, Kaplan, Livingston, Goodwin, Berkowitz & Selvin, Beverly Hills, Cal., of counsel), for amicus curiae Columbia Pictures Industries, Inc., and others.

Before MOORE and MANSFIELD, Circuit Judges, and HOLDEN, District Judge.*

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*Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

MANSFIELD, Circuit Judge:

The central issue presented by this appeal is the validity of a renewal copyright in D. W. Griffith's famous film classic The Birth of a Nation ("The Birth"), which was a pioneer in the field of full-length feature motion pictures. The renewal was issued in 1942 by the Copyright Office to Epoch Producing Corporation ("Epoch"), which in 1969 brought suit in the Southern District of New York for infringement against Killiam Shows, Inc., Gregstan Enterprises and Paul Killiam, defendants and third-party plaintiffs (collectively referred to herein as "Killiam"), and against Movielab, Inc. Killiam answered, contending that under the law governing copyright renewal, 17 U.S.C. § 24,[1] Epoch had no legal right to the renewal and

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[1]Title 17 U.S.C. § 24 provides:

"Duration; renewal and extension

"The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will,

that the motion picture passed into the public domain at the expiration of the original 28-year copyright term for lack of a valid renewal application.

A jury trial before Charles L. Brieant, Jr., *Judge*, resulted in special verdicts upholding the validity of the renewal and finding that Killiam had infringed it. Killiam appeals from orders assessing damages for infringement and dismissing Killiam's third-party complaint against Raymond Rohauer and Jay Ward Productions, Inc., charging a conspiracy to breach an alleged contractual obligation by Rohauer to refrain from claiming any copyright interest in The Birth and to assist Killiam in improving Killiam's alleged copyright in the motion picture. We hold that since the evidence introduced at trial permitted but one reasonable conclusion, namely, that Epoch had failed to sustain its burden of establishing the validity of its renewal copyright, it was error not to have directed a verdict in favor of Killiam on Epoch's claim. The dismissal of Killiam's third-party complaint for failure to state a cause of action is affirmed.

The numerous issues raised by the parties on this appeal require an understanding of the circumstances surrounding the production of The Birth and negotiations with respect to copyright interests in it. Because of the passage of some 60 years since the picture

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his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication."

was made and 32 years since the renewal copyright was issued, the parties have been relegated for the most part to reliance upon contemporaneous documentary proof. Though this evidence leaves substantial gaps, it does establish certain facts. The records of the Copyright Office, corroborated in part by live testimony and by other documentary proof, confirm that in 1914 David W. Griffith produced The Birth. The scenario, written by Griffith and Frank E. Woods, was based upon the novel "The Clansman" written by Thomas Dixon, copyrighted in 1904. Griffith was both the producer and director of the motion picture.

Griffith's role as producer and director of The Birth is evidenced by the first copyright application concerning the film, dated February 6, 1915, which was filed on February 13, 1915, in the name of the David W. Griffith Corporation ("DWG Corp."), a company controlled by Griffith. It applied for a copyright in The Birth as a motion-picture photoplay not reproduced for sale; in other words, as an unpublished work. A Certificate of Copyright Registration, issued to the DWG Corp. on February 13, 1915, states that the film was adapted from Thomas Dixon's novel and produced by D. W. Griffith, with story arrangement by D. W. Griffith and Frank E. Woods. The completed film was first publicly exhibited at Clune's Auditorium in Los Angeles on February 8, 1915, bearing copyright notice in the name of the DWG Corp.[2]

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[2]Statutory copyright in a published work is acquired through publication of the work with the notice of copyright prescribed by Title 17 affixed thereto. 17 U.S.C. § 10. All subsequent published copies of the work must also have the copyright notice affixed thereto. *Id.* Registration of the copyright in a published work is thus not necessary to acquire the copyright,

The copyrights for both the published and unpublished works were assigned by the DWG Corp. to Epoch and to Thomas Dixon by two instruments dated April 17, 1915. The assignment of the copyright in the unpublished work, filed with the Copyright Office on May 15, 1915, was signed by David W. Griffith as president of DWG Corp. It assigned "all its right, title and interest" in DWG Corp.'s copyright in the film, which was described as a copyright "for the term of twenty-eight years." The assignment of the copyright in the published work, filed with the Copyright Office on February 25, 1916, was signed by Albert H. T. Banzhaf as treasurer of DWG Corp. It conveyed all of DWG Corp.'s interest in "the copyright acquired by it by public presentation of the motion picture photoplay" with notice of copyright and authorized the assignees to apply for a Certificate of Copyright Registration.

Epoch and Dixon applied for registration of the copyright in the published work on October 1, 1915. A Certificate of Copyright was duly issued in their names, which recites that the film was produced under the direction of David W. Griffith, based on Thomas Dixon's novel, with scenario by D. W. Griffith and Frank E. Woods. The term of this statutory copyright was 28 years from February 8, 1915.

The foregoing evidence of D. W. Griffith's creation of The Birth was corroborated by testimony of two witnesses who were present at the making of The

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but is simply a recordation of it. Under 17 U.S.C. § 13, however, registration and deposit of copies of the work with the Copyright Office are conditions precedent to the bringing of an infringement action under Title 17. As a practical matter registration is necessary for full copyright protection.

Birth. Lillian Gish and Joseph Henaberry, who played roles in the picture, testified to Griffith's having been in charge of direction and production. Although Dixon was the author of the book upon which The Birth was based, there was no evidence that anyone other than Griffith and Woods wrote the screen photoplay or that anyone other than Griffith produced the motion picture.

On June 22, 1942, Epoch applied to the Copyright Office for a renewal copyright in The Birth, describing itself as both the "author," original claimant, and "the proprietor of copyright in a work made for hire." The term "author" is defined in the Copyright Act to include, "an employer in the case of works made for hire," 17 U.S.C. § 26. D. W. Griffith was listed as the director of the film and, along with Frank E. Woods, as author of the scenario. Thus Griffith was represented to be the employee who made the work for hire and Epoch as the "author," or his employer. A renewal certificate was issued by the Copyright Office in the name of Epoch as "the proprietor in a work made for hire." No other person or entity has ever applied for or received a renewal copyright in the film.[3]

In support of its characterization of the film as a "work made for hire," Epoch introduced into evidence at trial several agreements involving the proposed production of a film based on Thomas Dixon's novel. The

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[3]Although the 28-year renewal period was to expire in 1971, Congress has enacted special legislation periodically for the past 13 years which has had the effect of extending renewal copyrights, under the most recent enactment, through December 31, 1976. See, e.g., Pub.L. 93-573, Title 1, § 104, 88 Stat. 1873 (1974).

earliest of these agreements, dated December 20, 1913, which was before The Birth was made or first publicly exhibited, was between Dixon and Majestic Motion Picture Company. It granted to Majestic the "sole and exclusive right" to produce, license and exhibit a motion picture based upon Dixon's novel "The Clansman" and upon a dramatic version of the novel written by Dixon. The film was to be completed by July 1, 1914. Majestic was apparently unable to meet its obligations under this contract as a later agreement was entered into by Majestic and Dixon, dated June 9, 1914, extending the date for completion of the film to October 1, 1914, and changing the financial arrangements between the parties. There is no evidence, however, that Majestic participated in the making of The Birth or that it hired Griffith or anyone else to do so.

Epoch was not formed until February 6, 1915, which was after The Birth had been made. Its Certificate of Incorporation was filed in New York State on February 8, 1915, the date of the first public exhibition of The Birth in Los Angeles. Majestic had until this time apparently been unable to fulfill its obligations to Dixon. Epoch assumed those obligations in an agreement dated June 14, 1915. Dixon released Majestic from its obligations, which were increased from $75,000 to $110,000, and accepted Epoch in its place.[4] The

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[4]We are left to speculate why, The Birth having been produced and exhibited, Epoch and Majestic agreed to increase the amount of the obligations "as yet unperformed" by Majestic, which were assumed by Epoch. One possibility is that Majestic had intended to reimburse D. W. Griffith for sums already expended in the production of the picture. Another is that Majestic had already advanced monies to Griffith, which would

(This footnote is continued on next page)

two corporations, Majestic and Epoch, appear to have been closely related, since Harry E. Aitken was president of both. Their familiarity to D. W. Griffith is confirmed by Albert H. T. Banzhaf's status as treasurer of both Epoch and DWG Corp. However, there is no evidence of any employer-employee relationship between Majestic or Epoch, on the one hand, and D. W. Griffith, on the other. There is no contract of employment, record of salary payments, or proof that Majestic or Epoch supervised or controlled Griffith in the making of the picture.

The present suit by Epoch for infringement of its renewal copyright has its genesis in the acquisition, by means of a quitclaim deed, by Killiam Shows, Inc., in 1959 of any interest owned by the estate of D. W. Griffith in the right to a statutory renewal copyright in The Birth and in other films. Killiam has distributed The Birth to theatrical and television outlets from 1959 to the present.[5] This distribution is claimed by Epoch to have infringed its renewal copyright.

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leave unexplained the parties' use of the term "as yet unperformed." One could conjure up other possible reasons but we are in any event left without any evidence as to what part, if any, Majestic or Epoch played in the making of the film.

[5]On this appeal Killiam has abandoned its claim made below that the purchase by Killiam Shows, Inc. of all copyright interest in The Birth owned by the estate of David W. Griffith passed a real interest in the renewal copyright. Rather, it now asserts only that Epoch's renewal copyright is invalid and that therefore the work in question has passed into the public domain.

DISCUSSION

Of the various claims of error asserted by Killiam on this appeal, we turn first to the failure of the district court to grant Killiam's motion for a directed verdict since our disposition of that issue renders it unnecessary to consider some of the other grounds urged for reversal. First, a few words must be said about the standard by which we are governed in reviewing a district court's denial of a motion for a directed verdict or a motion for judgment notwithstanding the verdict. Our standard is the same as that which governs the trial court. The evidence must be "such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict," *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943). See *Urti v. Transport Commercial Corp.*, 479 F.2d 766, 768-69 (5th Cir. 1973); *O'Connor v. Pennsylvania Railroad Co.*, 308 F.2d 911, 914 (2d Cir. 1962).

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury." *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969).

To ascertain whether this standard was properly applied by the trial court we must "examine the entire record to determine whether there were any jury questions," *Stief v. J. A. Sexauer Manufacturing Co.*, 380 F.2d 453, 455 (2d Cir.), *cert. denied*, 389 U.S. 897, 88 S.Ct. 220, 19 L.Ed.2d 216 (1967); see *Boeing Co. v. Shipman, supra*, 411 F.2d at 374-76; *O'Connor v. Pennsylvania Railroad Co., supra*. This we have done.

The acquisition of initial statutory term and renewal copyrights in the United States is governed exclusively by the Copyright Act of 1909, 35 Stat. 1075 (1909), amended and enacted into law as Title 17, United States Code. Under that statute the term of protection provided for a copyrightable work is divided into two separate time periods, each 28 years in length. The right to obtain the initial 28-year term is vested in "[t]he author or proprietor of any work made the subject of copyright by [Title 17]." 17 U.S.C. § 9. As one would expect, the person claiming this initial term must either himself be the author of the copyrightable work (i.e., either the individual creator or the employer in the case of works made for hire, 17 U.S.C. § 26) or he must have succeeded to the rights of the author through an assignment or other device. 1 M. Nimmer, Copyright § 60, at 233 (1974).

The right to the renewal term copyright is not so simply defined. The renewal term is not merely an extension of the initial-term copyright vesting in the current owner of the original term. Rather, it has been described as a "new grant," e.g., *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469, 471 (2d Cir.), *cert. denied*, 342 U.S. 849, 72 S.Ct.

77, 96 L.Ed. 641 (1951); see *Fred Fisher Music Co. v. M. Witmark & Sons,* 318 U.S. 643, 63 S.Ct. 773, 87 L.Ed. 1055 (1943), which is "a separate interest distinct from the original copyright," *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co., Inc.,* 255 F.2d 518, 521 (2d Cir.), *cert. denied,* 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed.2d 69 (1958). The right of renewal is determined exclusively by 17 U.S.C. § 24, reproduced in note 1, *supra,* which provides that the renewal may be obtained by

(1) the proprietor of the original term copyright, in the case of certain types of work, i.e., posthumous works, composite works originally copyrighted by the proprietor, works copyrighted originally by a corporate body other than as an assignee or licensee of the individual author, or works copyrighted by an employer for whom such work is made for hire; or

(2) the individual author if still living at the time of renewal in the case of all other copyrighted works or, if the individual author is not living, his widow, her widower, children of the author, or next of kin.

Bearing in mind these basic principles and that the burden was on Epoch to make a prima facie showing of validity of its renewal copyright, see *Houghton Mifflin Co. v. Stackpole Sons, Inc.,* 113 F.2d 627 (2d Cir. 1940); 2 M. Nimmer, Copyright § 141.1 (1974), we turn to an evaluation of the proof and theories put forth by Epoch.

GROUNDS ASSERTED BY EPOCH OR BY AMICI CURIAE FOR UPHOLDING VALIDITY OF RENEWAL COPYRIGHT IN "THE BIRTH OF A NATION"

1. *The Theory that Epoch and/or Majestic Was an Employer of Griffith for Hire.*

Epoch advances several theories upon which it argues that the jury could have upheld the validity of its renewal copyright. The first of these is the ground upon which it sought and obtained the Certificate of Renewal from the Copyright Office in 1942, i.e., that the work had originally been copyrighted by it in 1915 as "an employer for whom such work [was] made for hire," thus making it the "author" within the Copyright Act's definition, 17 U.S.C. § 26. In support of this theory it points (a) to the three agreements between Dixon, Majestic and Epoch, entered into on December 20, 1913, June 9, 1914, and June 14, 1915, respectively, (b) to the two copyright assignments from DWG Corp. to Epoch, dated April 17, 1915, and (c) to the Certificate of Renewal issued in 1942 by the Copyright Office to Epoch as "the proprietor of copyright in a work made for hire," which was uncontested by Griffith during his lifetime or by his next of kin since his death.

On the basis of these documents it contends that an inference may be drawn that Majestic and/or Epoch hired D. W. Griffith to produce The Birth and that Griffith recognized Epoch's primary right to the copyright in the film. We disagree.

In our view this evidence is clearly insufficient to permit any jury reasonably to draw the inference urged

by Epoch. An inference will be upheld only if application of common experience and logic to the underlying evidence will support it. See, e.g., *Bruce Lincoln-Mercury, Inc. v. Universal C. I. T. Credit Corp.*, 325 F.2d 2, 22 (3d Cir. 1963); *United States v. Patterson*, 219 F.2d 659, 661-62 (2d Cir. 1955). Here, even giving Epoch the benefit of every doubt, no such process is possible. To permit a finding that Griffith was employed for hire by Majestic or Epoch on the basis of the evidence relied upon by Epoch would be to substitute mere speculation for reason and experience. At most the evidence shows that Dixon assigned to Majestic the right to produce a motion picture based on his novel, that Majestic was to finance the production, and that Majestic may have financed Griffith's production of the film. Even this last step toward the inference sought by Epoch stretches the reasoning process to the breaking point, since there is no showing that Majestic and/or Epoch actually supervised or paid any money for the making of the motion picture. Of importance to us, however, is the fact that the evidence sheds absolutely no light on the critical issue, which is what relationship, if any, existed between Griffith, on the one hand, and Majestic or Epoch, on the other. The evidence relied upon by Epoch does not, for instance, indicate whether Majestic and/or Epoch simply supplied capital for the production of the picture, whether they commissioned Griffith independently to produce the film, whether they "hired" Griffith as employee to do the work and, most important, whether they could have exercised the requisite power to control or supervise Griffith's work, which is the hallmark of "an employment for hire" relation-

ship, *Picture Music, Inc. v Bourne, Inc.*, 457 F.2d 1213, 1216-17 (2d Cir.), *cert. denied*, 409 U.S. 997, 93 S.Ct. 320, 34 L.Ed.2d 262 (1972); *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036, 88 S.Ct. 768, 19 L.Ed.2d 823 (1968). Epoch's argument that the absence of provisions in these contracts relating to Griffith's employment simply indicates that he, as a mere employee, had not been hired yet is wholly unsupported by any facts. In short, the evidence does not permit an inference that Epoch or Majestic employed Griffith for hire to make the motion picture.

Nor may an inference that Griffith was employed by Majestic or Epoch be drawn from the fact that DWG Corp. assigned its rights in the initial copyright to Epoch and to Dixon. Viewed most favorably to Epoch, the assignments merely evidenced a transfer of interest, which might have been motivated by a number of considerations unconnected in any way with an employer-employee relationship. One might speculate, for instance, that Griffith transferred the copyrights in recognition of past financing of his independent production of The Birth or in anticipation of a future relationship with Epoch. Absent some evidence of an employer-employee relationship, the existence of evidence that is as consistent with such a relationship as it is with numerous other hypotheses, cannot be bootstrapped to remedy the basic deficiency which is the absence of any proof that Griffith was in fact hired by Majestic or Epoch to make the film. Cf. *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333, 339-42, 53 S.Ct. 391, 77 L.Ed. 819 (1933).

The contention that Griffith may have been an employee for hire of Epoch is further belied by the fact that Epoch did not come into existence until February 8, 1915, which was after The Birth had been produced by Griffith. Indeed, February 8, 1915, was the very day on which the film was first publicly exhibited at Clune's Auditorium. These undisputed facts directly contradict Epoch's representations in its application for renewal copyright in 1942 that it was the "author" (i.e, employer for whom the work was made for hire) of the film.

Any contention that DWG Corp., the only other possibility, was the employer of Griffith must be discarded for similar reasons. Evidence produced at trial by defendant Killiam, and uncontradicted by plaintiff, conclusively proved that DWG Corp. was essentially an inactive shell corporation in 1914 and 1915, the years during which the film was created. Its financial records for those years, including its federal income tax returns, show no expenditures for the production of any motion pictures. It engaged in no business at all in 1914 and obtained some slight income in 1915, mostly from motion picture rentals. Under these circumstances it could not have been an employer for whom the film was made for hire.

2. *The Theory that Epoch's Certificate of Copyright Renewal Registration Creates a Presumption of Validity.*

Having failed to point to evidence on the record from which a jury could reasonably conclude that The Birth was made by D. W. Griffith in the employment of another party, Epoch argues, pursuant to 17 U.S.C. § 209, that the Certiricate of Copyright

Renewal that it obtained in 1942 was prima facie proof of the facts stated therein and of the validity of the renewal copyright. Further, it contends that the passage of time without challenge to the renewal adds significant support to its validity. Both of these contentions must be rejected.

Title 17 U.S.C. § 209 does create a presumption of validity with respect to a certificate of initial copyright registration, stating that it "shall be admitted in any court as prima facie evidence of the facts stated therein." It is clear from the construction of § 209, however, that the presumption was meant to attach only to *original* certificates. All of § 209 is concerned with the contents of the original certificate of registration, the information that must be supplied by the original claimant and various other mechanics of the original registration procedure. No reference at all is made to the requirements of renewal applications and certificates. In this context the reference to "[s]aid certificate" in regard to the presumption can only refer to the *original* registration certificate.

Additionally, the minimal verification of the information supplied in connection with an application for an original copyright certificate is wholly absent in the case of a renewal application. The Copyright Office directs in its regulations that the application for original registration accurately reflect "the facts existing at the time of first publication." 37 C.F.R. § 202.3(b)(3). No such admonition is applied to applications for renewal copyright. Indeed, the Copyright Office will accept and register more than one claim to the renewal copyright in a particular work, even if the claims are in obvious conflict. B. Ringer,

Renewal of Copyright, in *Report of the Register of Copyrights on the Revision of the U. S. Copyright Law, Study No. 31*, at 107, 184 (1960) (hereinafter cited as "Ringer"). The Office will point out the conflict to the later applicant and request confirmation of the later claim, but does not view its function as making "judicial determinations of substantive renewal rights" and will register the conflicting claim of a determined applicant. *Id.* This drastic diversity in the treatment of original and renewal applications confirms our interpretation of § 209. Congress surely did not intend that such great weight attach to renewal certificates issued to all claimants regardless of questions concerning validity.[6]

Finally, even assuming that some presumption of validity might attach to Epoch's renewal certificate, at least where 27 years passed without challenge, that presumption would certainly be dissipated, as in the case of the § 209 presumption, see, e.g., *Lauratex Textile Corp. v. Citation Fabrics Corp.*, 328 F.Supp. 554, 555 (S.D.N.Y. 1971); *United Merchants and Manufacturers, Inc. v. Sarne Co., Inc.*, 278 F.Supp. 162, 164 (S.D.N.Y. 1967), by proof that material statements in the certificate were false. As outlined

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[6]Only one of the parties, Epoch Producing, cites any case authority on this presumption issue. The one case cited by Epoch, *Rohauer v. Killiam Shows, Inc.*, 379 F.Supp. 723 (S.D. N.Y. 1974), is unpersuasive. While the opinion does accord prima facie weight, pursuant to § 209, to a renewal copyright certificate, *id.* at 733-34, it does so without any consideration or analysis of the factors discussed in the text, which distinguish original and renewal applications. Moreover, it cites as authority for according such weight to renewal certificates only decisions which considered original copyright certificates. Furthermore, this decision was rendered in a case still pending in the Southern District of New York and has not yet been reviewed by this court.

above, the documentary evidence introduced at trial showed that Epoch could not have been the author of the film, even though this status was claimed in the renewal application and there is no proof that Majestic or DWG Corp. employed Griffith to make the motion picture for hire. Indeed, none of the evidence supports the assertion made in the renewal certificate that the film was made for hire, and much of it (including the documentary records regarding the original copyright) points to a contrary conclusion. In these circumstances, any evidentiary weight that the renewal certificate might otherwise have had is offset and the burden of proving the validity of its renewal is shifted back to Epoch, *Gardenia Flowers, Inc v. Joseph Markovits, Inc.*, 280 F.Supp. 776, 780-81 (S.D.N.Y. 1968). Epoch has failed to sustain that burden.

3. *The Theory that the 1915 Assignments Conveyed the Renewal Rights.*

Epoch's alternative ground upon which a jury might have upheld its renewal is based on the assignment of the original term copyright from DWG Corp. in 1915. As explained above, the copyright in both the published and unpublished versions of the film was originally secured by DWG Corp. and then assigned to Dixon and Epoch in instruments dated April 17, 1915. Relying mainly upon broad language found in each assignment, which purports to transfer to Epoch all of the rights in the copyright enjoyed by the assignor, DWG Corp., Epoch now argues that these assignments can be fairly construed to have conveyed to it the right to both the original term copyright and the renewal copyright in The Birth. We disagree.

The construction of the assignments urged by Epoch is not one that a jury could fairly adopt, given the record in this case.[7] While Epoch is correct that both assignments contain broad general language purporting to convey to Epoch all of the DWG Corp.'s interest in the film, that language is necessarily limited in its application by the specific description in each assignment of the interest conveyed, see Corbin, Contracts §§ 547, 549 (1960). In both assignments the interest is clearly identified as the first 28-year term only. The assignment of the unpublished work specifically describes the copyright as one "for the term of twenty-eight years." The assignment of the published work conveyed "the copyright acquired by [DWG Corp.] by public presentation of the motion picture photoplay"; a clear reference to the initial 28-year term, since the renewal term is separate from the initial term and not acquired through publication with notice, see *Fred Fisher Music Co. v. M. Witmark & Sons, supra.*

Moreover, there is no specific reference in either assignment to the renewal term. This deficiency has generally been held as a matter of law, absent contrary evidence, to preclude a holding that a transfer of

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[7]In the construction of copyright assignments, as with contracts and other writings, the meaning to be placed on the words of the assignment ultimately turns upon the intention of the parties to the agreement. *Venus Music Corp. v. Mills Music, Inc.*, 261 F.2d 577 (2d Cir. 1958); *Rossiter v. Vogel*, 134 F.2d 908 (2d Cir. 1943). That intention is to be determined from the evidence submitted to the court, including the agreement itself, statements and actions of the parties contemporaneous with and following the agreement, oral testimony, affidavits, depositions, and other equally competent evidence. The only evidence as to the intent of the parties introduced in this case was the agreements themselves.

renewal rights was intended. "[A] general transfer by an author of the original copyright without mention of renewal rights conveys no interest in the renewal rights without proof of a contrary intention." *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co., supra,* 255 F.2d at 521; see, e.g., *G. Ricordi & Co. v. Paramount Pictures, Inc., supra,* 189 F.2d at 471. Epoch points to no evidence of a different intention in the present case.

While Epoch correctly observes that the assignment here is from a corporation and not from an individual author, we do not think that difference is critical here, where the corporation was controlled by the author. The policy behind the rule of construction restricting an assignment to the original term unless it refers to renewal rights is to protect authors from inadvertent transfers of renewal rights. That policy, it is true, might not govern a transfer from a corporation unrelated to the author, see *Rohauer v. Friedman,* 306 F.2d 933, 935-36 (9th Cir. 1962). Here, however, DWG Corp. was in effect the author's alter ego. Epoch adduced no proof that DWG Corp. had any independent right (i.e., as purchaser for value or as employer for hire) to obtain the film copyrights. Thus DWG Corp. could only have obtained the copyright as the nominee or instrumentality of Griffith himself through assignment by Griffith of his common law copyright to the corporation, which need not have been in writing, cf. *Dave Grossman Designs, Inc. v. Bortin,* 347 F.Supp. 1150, 1154 (N.D.Ill. 1972). The policy behind the rule of construction that favors the author's retention of renewal rights, therefore, is served by application of the rule in such a situation. The

transfer from the DWG Corp. is analogous to a transfer from the individual author and the assignments should be construed in accordance with the rule of *Marks Music Corp.* Since there is no other proof of an intention to transfer renewal rights, the assignments must be limited in their effect to the original term copyright.[8]

4. *The Theory that Epoch was Entitled to Renewal of the Work as One "Copyrighted by a Corporate Body."*

Finally, *amici curiae* argue that Epoch's renewal copyright could have been upheld by the jury under the proviso of § 24 of the Copyright Act which gives to the original term copyright proprietor the right to the renewal copyright "of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author)." Starting with the undisputed fact that The Birth was copyrighted by a corporate body, DWG Corp., the contention is that it must have been an employer for hire and that Epoch, as its assignee, falls within the proviso.

This argument fails for several reasons. First, the assumption that D. W. Griffith made the film as an

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[8]A further limitation on the interest conveyed by the copyright assignments from DWG Corp. to Epoch is Epoch's failure to introduce any evidence to prove that DWG Corp. in fact owned anything more than the initial 28-year copyright term. As explained in the text, since there was no proof that DWG Corp. had any right to apply for the copyright in its own name, it must have obtained the original copyright on the film with Griffith's permission as the assignee or licensee of Griffth's common law copyright. Such an assignment by the author of a work conveys only initial term copyright, reserving the renewal for the author himself. See *Austin v. Steiner*, 207 F.Supp. 776 (N.D.Ill. 1962); 2 M. Nimmer, Copyright § 114.3, at 469 (1974).

employee for hire is, as we have demonstrated, unsupported by any evidence. Epoch wholly failed to carry its burden of proving that D. W. Griffith was an employee for hire of DWG Corp. or anyone else. The evidence, on the contrary, demonstrated that he was the individual author of the film and that DWG Corp. could only have copyrighted the work as the licensee or assignee of his common law copyright, cf. *Dave Grossman Designs, Inc. v. Bortin, supra,* 347 F.Supp. at 1154. The clause cannot apply in these circumstances. *Donaldson Publishing Co. v. Bergman, Vocco & Conn, Inc., supra,* 375 F.2d at 643.

Furthermore, what authoritative commentary exists concerning the "corporate body" provision of § 24 indicates that it has no application to works of this type which are authored and produced by one identifiable person either as an employee for hire or as an independent author. See Ringer, *supra,* at 136-37. For instance, Judge Learned Hand in dictum interpreted the clause as applying only to works composed by persons related to a corporation, but not as employees for hire, assignors or licensors. *Shapiro, Bernstein & Co. v. Bryan,* 123 F.2d 697, 699 (2d Cir. 1941).[9] The only other interpretation of note would apply the clause only to works of an impersonal nature composed by a staff or others whose individual work is merged into the whole and incapable of separate identification. Ringer, *supra,* at 136.

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[9]Conceivable examples of such works include (1) writings by members of a religious order, although not its employees, have no personal right in the work, and (2) writings for the corporation by a corporate official or major stockholder. Ringer, *supra,* at 137 n. 215.

In sum there was insufficient evidence introduced at trial from which the jury could reasonably find Epoch's renewal copyright valid under any of the theories advanced below and on this appeal. As Epoch was unable to produce even a prima facie case supporting the validity of its renewal copyright at trial, we hold that the district court should have granted Killiam's motion for a directed verdict. Our holding makes it unnecessary to resolve the many other issues raised by the parties, including (1) the contention that a renewal copyright may not be sought by the proprietor of an original copyright in a work made for him unless the copyright was first obtained by the employer (as distinguished from an assignee), and (2) the errors claimed to have been committed by the trial judge in his instructions to the jury, in his exclusion of evidence bearing on the authorship of The Birth, in the special verdict questions put to the jury, and in his award of damages and attorneys' fees to Epoch.

KILLIAM'S THIRD-PARTY ACTION AGAINST ROHAUER AND JAY WARD PRODUCTIONS, INC.

As to Killiam's third-party action alleging a conspiracy to breach a contractual obligation to protect and enhance its interest in the copyright, Killiam has now abandoned its claim that it ever owned an interest in The Birth. Since one suffers no loss from damage to property unless one possesses some interest in that property, Killiam suffered no damage from the alleged acts of the third-party defendants and the third-party complaint no longer states a cause of action, cf. *Rich*

v. New York Stock Exchange, ... F.2d .... (2d Cir. 1975) (Feinberg, *J.*, concurring). Its dismissal by the district court will therefore be affirmed.

CONCLUSION

The trial court erred in not directing a verdict to the effect that Epoch had failed to establish the validity of its renewal copyright and in not dismissing Epoch's complaint. Accordingly the judgment of the district court awarding damages and attorneys' fees to Epoch is reversed and the case is remanded with instructions to enter judgment dismissing Epoch's complaint.

Costs are awarded to Killiam against Epoch for costs incurred upon Killiam's appeal from the award of damages and equitable relief to Epoch and upon Epoch's cross-appeal with respect to relief. Each party will bear its own costs incurred with respect to the appeal on the third-party action.

APPENDIX B.

Order Denying Rehearing.

United States Court of Appeals, Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of October, one thousand nine hundred and seventy-five.

Present: Hon. Leonard P. Moore, Hon. Walter R. Mansfield, Circuit Judges.

Hon. James S. Holden, District Judge.

Epoch Producing Corporation, Plaintiff-Appellee and Cross-Appellant, v. Killiam Shows, Inc., Gregstan Enterprises, Inc., Paul Killiam, Movielab, Inc., Defendants-Appellants and Cross-Appellees, Killiam Shows, Inc., Gregstan Enterprises, Inc., Paul Killiam, Third Party Plaintiffs-Appellants, v. Raymond Rohauer and Jay Ward Productions, Inc., Third Party Defendants-Appellees. 73-2795, 74-1269, 74-1425.

A petition for a rehearing having been filed herein by counsel for the Plaintiff-Appellee.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX C.

Order Granting Stay.

United States Court of Appeals, Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of November, one thousand nine hundred and seventy-five.

Killiam Shows, Inc., et al., Third-Party Plaintiffs-Appellants, v. Raymond Rehauer and Jay Ward Productions, Inc., Third-Party Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellee, Epoch Producing Corporation by notice of motion dated October 20, 1975 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

Leonard P. Moore, U.S.C.J.
/s/ Walter R. Mansfield
Walter R. Mansfield, U.S.C.J.
Circuit Judges
James S. Holden, U.S.D.J.

APPENDIX D.

Order Granting Further Stay.

United States Court of Appeals, Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of December, one thousand nine hundred and seventy-five.

Killiam Shows, Inc., et al., Third-Party Plaintiffs-Appellants, v. Raymond Rohauer and Jay Ward Productions, Inc. Third-Party Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the plaintiff, appellee, Epoch Producing Corp. by notice of motion dated November 28, 1975 to further stay the issuance of the mandate to and including January 16, 1976 pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure be and it hereby is granted on condition that appellees post a supersedeas bond in the sum of $21,422.62.

Leonard P. Moore, U.S.C.J.
Walter R. Mansfield, U.S.C.J.
Circuit Judges
James S. Holden, U.S.D.J.

APPENDIX E.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

2. The provisions of the Seventh Amendment are:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

3. The provisions of 17 U.S.C. §24 are:

"The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the

case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next to kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. July 30, 1947, c. 391, § 1, 61 Stat. 652."

4. The provisions of 17 U.S.C. §26 are:

"In the interpretation and construction of this title "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire. July 30, 1947, c. 391, § 1, 61 Stat. 652."

5. The provisions of 17 U.S.C. §28 are:

"Copyright secured under this title or previous copyright laws of the United States may be assigned, granted,

or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will. July 30, 1947, c. 391, § 1, 61 Stat. 652."

6. The provisions of 17 U.S.C. §209 are:

"In the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section 17 of this title, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The Register of Copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after July 1, 1909, and in the case of all previous registra-

tions so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration. July 30, 1947, c. 391, § 1, 61 Stat. 652."

7. The provisions of 17 U.S.C. § 210 are

"The Register of Copyrights shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalog of the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalog for each class of copyright entries, and may thereupon, if expedient, destroy the original manuscript catalog cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalog of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards any copyright registration. July 30, 1947, c. 391, § 1, 61 Stat. 652."